

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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ARROWOOD INDEMNITY COMPANY, a  
Delaware Corporation, formerly  
known as ROYAL INSURANCE COMPANY  
OF AMERICA, and successor to  
ROYAL GLOBE INSURANCE COMPANY

Plaintiff,

v.

CITY OF WEST SACRAMENTO; and  
ROES 1-50, inclusive

Defendants.

No. 2:21-cv-00397 WBS JDP

ORDER RE: CITY OF WEST  
SACRAMENTO'S MOTION TO  
DISMISS

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This is an insurance coverage dispute concerning whether plaintiff Arrowood Indemnity Company ("Arrowood") has an obligation, under its duty to indemnify, to pay a Stipulated Judgment against its insureds in a related action, City of West Sacramento v. R and L Business Management, No. 2:18-cv-900-WBS-JDP (the "R&L Action"). Defendant City of West Sacramento ("the

1 City") now moves to dismiss for failure to state a claim upon  
2 which relief may be granted. (See Mot. to Dismiss (Docket No.  
3 11).)

4 I. Factual Background

5 In the R&L Action, the City of West Sacramento filed an  
6 environmental enforcement action against R and L Business  
7 Management ("R&L") as the successor in interest to Stockton  
8 Plating, Inc., John Clark, and the Estate of Nick Smith,  
9 Deceased<sup>1</sup> (collectively, "the R&L defendants"), among others, to  
10 address environmental contamination at and emanating from 319 3rd  
11 St., West Sacramento, California (the "Site"). (First Amended  
12 Complaint ("FAC") ¶ 13 (Docket No. 9).) In the course of the  
13 litigation, the court granted two largely undisputed motions for  
14 summary judgment against the R&L defendants, and, after holding a  
15 three-day evidentiary hearing (the "Divisibility Hearing"),  
16 determined that they were each jointly and severally liable for  
17 the contamination at the Site under the Comprehensive  
18 Environmental Response, Compensation, and Liability Act  
19 ("CERCLA") § 107(a). (FAC, Ex. E ("Stipulated Judgment") (Docket  
20 No. 9-5).)

21 A. Arrowood's Insurance Policies and Defense of the R&L  
22 Defendants

23 Arrowood--the R&L defendants' insurer--defended the R&L  
24 defendants subject to a reservation of rights throughout the

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25 <sup>1</sup> The City sued the Estate of Nick Smith pursuant to  
26 California Probate Code §§ 550-555, which permits an action to  
27 establish a decedent's liability for which the decedent was  
28 protected by insurance to be commenced or continued against the  
decedent's estate without the need to join the decedent's  
personal representative or successor in interest as a party.

1 action because of four insurance policies it and its predecessor  
2 had issued to R&L and Smith between 1976 and 1986 (the "Arrowood  
3 Policies").<sup>2</sup> (FAC ¶ 18.) These policies provided comprehensive  
4 general liability insurance for damage to property, subject to  
5 several exclusions. (See FAC ¶ 10.) Two exclusions are  
6 applicable to this case: the "Pollution Exclusion" and the "Owned  
7 Property Exclusion." (See id.) The Pollution Exclusion states  
8 that "this insurance does not apply to bodily injury or property  
9 damage arising out of the discharge, dispersal, release or escape  
10 of . . . contaminants or pollutants into or upon land." (Id.)  
11 This exclusion is subject to an exception, however, for  
12 discharges that are "sudden and accidental" (the "Sudden and  
13 Accidental Exception"). (Id.)

14 The Owned Property Exclusion states that no coverage  
15 exists for

16 property damage to

- 17 (1) property owned or occupied by or  
18 rented to the insured;
- 19 (2) property used by the insured; or
- 20 (3) property in the care, custody or  
21 control of the insured or as to which  
the insured is for any purpose  
exercising physical control.

22 (Id.)

23 In other words, Arrowood's policies generally do not  
24 provide coverage for property damage occurring due to the  
25 release of environmental pollutants. (See id.) If it is  
26 determined, however, that those releases were "sudden and

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27 <sup>2</sup> Each of these policies also covered officers and  
28 directors of R&L, which included Clark. (FAC ¶¶ 6-9, 15-17, 19.)

1 accidental,” and that property not owned, possessed, or used by  
2 the R&L defendants was damaged, coverage exists and Arrowood  
3 owes the R&L defendants a duty to indemnify. (See id.)

4 B. The Settlement Agreement and Stipulated Judgment

5 On March 3, 2021, the City, the R&L defendants, and  
6 Arrowood entered into a settlement agreement, which included a  
7 covenant to request that the court enter a stipulated judgment  
8 against the R&L defendants (the “Stipulated Judgment”). (See  
9 FAC, Ex. F at 2-14 (“Settlement Agreement”).) The City agreed  
10 not to execute the judgment against the R&L defendants. Instead,  
11 the City agreed to only execute the judgment against Arrowood  
12 pursuant to California Insurance Code § 11580, which permits  
13 judgment creditors to bring an action against an insurer to  
14 recover on a judgment against its insured, subject to the  
15 policy’s terms and limitations. See (id.); Cal. Ins. Code  
16 § 11580(b)(2).

17 Pursuant to the Settlement Agreement, Arrowood agreed  
18 to reimburse the City for its past response costs in the amount  
19 of \$125,627.90, and to complete site investigation to the  
20 satisfaction of the California Department of Toxic Substances  
21 Control (“DTSC”). (Settlement Agreement at 2.) Arrowood also  
22 agreed to fund remediation of the site, as indemnity, but only if  
23 the City, as a judgment creditor under the Stipulated Judgment,  
24 prevails and obtains a final, non-appealable judgment in an  
25 action brought under California Insurance Code § 11580. (Id. at  
26 5-6.)

27 On March 10, 2021, the court entered the Stipulated  
28 Judgment against the R&L defendants in favor of the City. (See

1 FAC, Ex. F at 16-139 ("Stipulated Judgment").) The Stipulated  
2 Judgment attaches and incorporates the court's rulings on the  
3 City's motions for summary judgment and its Order Denying  
4 Defendants' Request for a Finding of Divisibility under CERCLA  
5 (the "Divisibility Order"), and finds that the City is entitled  
6 to judgment on its claims against the R&L defendants under  
7 CERCLA, the Carpenter-Presley-Tanner Hazardous Substance Account  
8 Act ("HSAA"), the Resource Conservation and Recovery Act  
9 ("RCRA"), the Gatto Act, the Porter-Cologne Water Quality Control  
10 Act, and California public nuisance law. (See id. at 4.)

11 C. The Instant Action

12 Arrowood filed this declaratory relief action on March  
13 3, 2021. (See Compl. (Docket No. 1).) While Arrowood's original  
14 complaint named R&L, John Clark, the Estate of Nick Smith, and  
15 the City of West Sacramento as defendants (see Compl. ¶¶ 5-8),  
16 Arrowood amended its complaint on March 11, 2021, naming only the  
17 City as a defendant. (See FAC ¶ 5.) The operative complaint  
18 seeks declarations that (1) Arrowood owes no duty to satisfy the  
19 Stipulated Judgment on the ground that the Arrowood Policies  
20 exclude coverage for the claims alleged against the R&L  
21 defendants; and (2) even if the court finds that Arrowood has a  
22 duty to satisfy the Stipulated Judgment, the applicable limit of  
23 the Arrowood Policies is \$500,000. (See FAC at 15-17.) Arrowood  
24 attached the Stipulated Judgment--including the prior court  
25 orders that it incorporates--to its operative complaint as an  
26 exhibit.<sup>3</sup> (See FAC, Ex. F.)

27  
28 <sup>3</sup> The City filed a counterclaim against Arrowood--not at  
issue here--on April 6, 2021, under California Insurance Code §

1     II.   Discussion

2                 Federal Rule of Civil Procedure 12(b)(6) allows for  
 3     dismissal when the plaintiff's complaint fails to state a claim  
 4     upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6).  
 5     The inquiry before the court is whether, accepting the  
 6     allegations in the complaint as true and drawing all reasonable  
 7     inferences in the plaintiff's favor, the complaint has stated "a  
 8     claim to relief that is plausible on its face." Bell Atl. Corp.  
 9     v. Twombly, 550 U.S. 544, 570 (2007). "The plausibility standard  
 10    is not akin to a 'probability requirement,' but it asks for more  
 11    than a sheer possibility that a defendant has acted unlawfully."  
 12    Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "Threadbare  
 13    recitals of the elements of a cause of action, supported by mere  
 14    conclusory statements, do not suffice." Id. Although legal  
 15    conclusions "can provide the framework of a complaint, they must  
 16    be supported by factual allegations." Id. at 679.

17                The City argues that dismissal of Arrowood's first  
 18    claim--that it is entitled to a declaration that it owes no duty  
 19    to indemnify under the terms of the Arrowood Policies--is  
 20    warranted because prior orders of the court in the R&L Action  
 21    establish that neither the Pollution Exclusion nor the Owned  
 22    Property Exclusion apply.<sup>4</sup> (See Mot. to Dismiss at 7-10.)

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11850. The City claims that the R&L defendants' liability under  
 24    the Stipulated Judgment is covered by the Arrowood Policies.  
 25    (See City's Counterclaim (Docket No. 13).)

26                <sup>4</sup> Although the City's Motion to Dismiss argues that  
 27    "Arrowood's First Amended Complaint should be dismissed," the  
 28    City's Motion focuses only on Arrowood's first claim, failing to  
 present any argument for why dismissal is appropriate as to  
 Arrowood's second claim that, even if the court finds that  
 Arrowood has a duty to indemnify, the applicable limit of the

1 Because the issue of insurance coverage was not "actually  
2 litigated" in the R&L Action, the City does not contend--nor  
3 could it--that Arrowood is collaterally estopped from litigating  
4 the issue of insurance coverage in this case. See Clark v. Bear  
5 Stearns & Co., Inc., 966 F.2d 1318, 1320-21 (9th Cir. 1992).

6 Rather, the City contends that the court's findings of fact in  
7 its two Summary Judgment orders and its Divisibility Order from  
8 the R&L Action negate allegations in Arrowood's complaint that  
9 the Sudden and Accidental and Owned Property Exclusions apply,  
10 such that dismissal is appropriate. See Fed. R. Civ. P.  
11 12(b)(6).

12 The City points out that these orders were attached to  
13 the Stipulated Judgment as exhibits and expressly incorporated  
14 into the Judgment "as though stated in full," (see Stipulated  
15 Judgment at 2-3), and that Arrowood itself attached the  
16 Stipulated Judgment as an exhibit to its complaint (see FAC, Ex.  
17 F).

18 As a preliminary matter, the court did not make any  
19 findings of fact in its prior summary judgment Orders. When  
20 evaluating a motion for summary judgment, the court merely  
21 assesses the evidence submitted by the parties to determine  
22 whether a genuine dispute of material fact exists--that is,  
23 whether a "dispute[] over facts that might affect the outcome of  
24 the suit under the governing law" exists. See Fed. R. Civ. P.  
25 56; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).  
26 The court does not resolve factual disputes or make findings of

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Arrowood Policies is \$500,000. (See generally Mot. to Dismiss;  
28 FAC ¶¶ 54-59.)

1 fact; factual determinations are expressly reserved for the jury  
2 at trial. See id. There were therefore no "findings of fact" in  
3 the court's prior summary judgment Orders.

4 The court's Divisibility Order is on slightly different  
5 footing because that Order was issued after the court held a  
6 three-day evidentiary hearing and made findings of fact. (See  
7 generally Divisibility Order.) The court's findings, however,  
8 did not concern the issue of insurance coverage--rather, the  
9 court found that the R&L defendants' contribution to the  
10 environmental harm at the Site was not divisible from other  
11 operator's contributions. (See Divisibility Order at 28.) Thus,  
12 while the court may consider the findings made in its  
13 Divisibility Order because the Order was attached to Arrowood's  
14 complaint as an exhibit, see Fed. R. Civ. P. 10(c) (a "copy of a  
15 written instrument that is an exhibit to a pleading is part of  
16 the pleading for all purposes"); Lee v. City of Los Angeles, 250  
17 F.3d 668, 688 (9th Cir. 2001) (courts may properly consider  
18 material submitted as part of the complaint on a motion to  
19 dismiss without converting the motion to dismiss into a motion  
20 for summary judgment), as the following analysis shows, these  
21 findings certainly do not establish, as a matter of law, that the  
22 Arrowood Policies provide coverage in this case.

23 Under the Arrowood Policies, Arrowood owes no duty to  
24 indemnify if either the Pollution Exclusion or the Owned Property  
25 Exclusion applies. (See FAC ¶¶ 10.) Though it is the nominal  
26 defendant in this action, the City ultimately bears the burden in  
27 this action of establishing that neither exclusion applies. See  
28 ABM Indus., Inc. v. Zurich Am. Ins. Co., No. C 05-3480 SBA, 2006

1 WL 2595944, at \*12 (N.D. Cal. Sep. 11, 2006), aff'd in part sub  
2 nom. ABM Indus., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh,  
3 291 F. App'x 800 (9th Cir. 2008); State of Cal. v. Allstate Ins.  
4 Co., 45 Cal. 4th 1008, 1036 (Cal. 2009) ("The insured under a  
5 third party liability policy has the burden of proving a covered  
6 act or event was a substantial cause of the injury or property  
7 damage for which the insured is liable, and this burden extends  
8 to showing the causal act or event was within an exception to a  
9 policy exclusion when the insurer has shown the exclusion  
10 applicable.").

11           When determining whether an event is "sudden and  
12 accidental," the court must first determine which "particular  
13 discharges or discharges . . . gave rise to [the] property  
14 damage." See Allstate, 45 Cal. 4th at 1021. The California  
15 Supreme Court has instructed that it is the "discharge,  
16 dispersal, release, or escape" of contaminants from confinement  
17 or containment into the broader environment, rather than the  
18 initial deposition of the contaminant or pollutant into  
19 confinement, that matters for purposes of the analysis. See id.  
20 Once the court has determined the discharges that are at issue,  
21 it then must evaluate each discharge separately to determine  
22 whether it was "sudden," "accidental," "non-trivial and  
23 indivisible," and a "substantial factor" in the insured's  
24 liability. See id. at 1036-37.

25           Arrowood identifies several categories of discharges  
26 which it alleges were not "sudden and accidental," but rather  
27 gradual, foreseeable, intentional, or trivial. (See FAC ¶¶ 27-  
28 47.) First, Arrowood alleges that releases occurred as part of

1 the metal plating process, when Stockton Plating employees would  
2 place bumpers into a series of tanks filled with dissolved  
3 nickel, copper, and chromium solutions. (FAC ¶ 35.) When  
4 employees removed bumpers from the plating solutions or from  
5 rinse tanks, fluids from the tanks and droplets of plating  
6 solution or rinse solution would fall onto the floor. (Id.)  
7 Employees also occasionally dropped bumpers as they were removed  
8 from plating and rinse tanks, causing fluids to splash onto the  
9 ground. (Id.) Arrowood alleges that these “drag out” releases  
10 were an “expected and intended part” of Stockton Plating’s  
11 business practice and were “virtually certain to occur from the  
12 nature of the plating operations.” (Id. at ¶ 38.)

13 Second, the complaint alleges that, from 1973 to 1974,  
14 Stockton Plating allowed plating rinse fluids to flow directly  
15 onto the floor in the plating area. (Id. at ¶ 36.) Then, in  
16 1974, employees placed dirt and gravel on the exterior of the  
17 building to prevent fluids from exiting the building through the  
18 man-made hole. (Id.) These nonpermanent, permeable dirt and  
19 gravel walls eroded several times, causing plating fluids to  
20 escape, and employees to rebuild the wall with additional dirt  
21 and gravel. (Id.)

22 Third, Arrowood alleges that releases occurred when  
23 Stockton Plating employees would straighten, grind, and polish  
24 bumpers on the Site, causing shavings from bumpers to fall onto  
25 the floor or to be dispersed into the air. (FAC ¶ 34.) The  
26 grinding and polishing room contained a collector powered by a  
27 large fan that gathered dust into a bag, and a janitor swept the  
28 grinding and polishing rooms at the end of each day, emptied the

1 dust collector bag, and placed dust and shavings into a dumpster  
2 outside of the building. (Id.)

3 Although Arrowood alleges that two fires occurred in in  
4 1973 and 1985 in the grinding and polishing rooms, Arrowood  
5 alleges that these fires did not result in the release of  
6 contaminants or pollutants because the fires did not damage the  
7 plating area, the plating tanks were covered at the end of each  
8 work day, preventing the release of fluids, and the grinding and  
9 polishing rooms were cleaned of their dust and metal shavings at  
10 the end of each day. (See FAC ¶¶ 41-45.)

11 The findings from the court's Divisibility Order do not  
12 even come close to establishing that any of these alleged  
13 discharges were "sudden and accidental." Case law has  
14 established that the term "accidental" for purposes of the sudden  
15 and accidental inquiry means "an unexpected or unintended  
16 discharge." Allstate, 45 Cal. 4th at 1020. "Sudden" means "an  
17 unexpected event that is abrupt or immediate in nature," Shell  
18 Oil Co. v. Winterthur Swiss Ins. Co., 12 Cal. App. 4th 715, 755  
19 (1st Dist. 1993), and an "unexpected" event has further been  
20 defined as one where "the insured did not know or believe that  
21 the event was substantially certain or highly likely to occur,"  
22 A-H Plating v. Am. Nat'l Fire Ins. Co., 57 Cal. App. 4th 427, 435  
23 (2d Dist. 1997).

24 The court simply did not make any findings in its  
25 Divisibility Order as to whether Stockton Plating employees knew  
26 or believed that any of the discharges at issue in the case were  
27 "substantially certain or highly likely" to occur. (See  
28 Stipulated Judgment, Ex. F.) And though the court found that the

1 R&L defendants' overall contribution to the environmental harm at  
2 the Site was not divisible from the contributions of other  
3 operators, the court made no findings regarding whether the harm  
4 caused by any particular R&L discharges could be separated from  
5 the harm caused by other R&L discharges. (See generally  
6 Divisibility Order.) The court also made no findings as to  
7 whether certain releases identified by the parties, including  
8 those caused by the 1973 and 1985 fires and the 1986 rain event,  
9 were "trivial" or a "substantial factor" in the R&L defendants'  
10 liability. See Allstate, 45 Cal. 4th at 1036.

11 Arrowood has adequately stated a claim that it is  
12 entitled to declaratory relief based on the applicability of the  
13 Arrowood Policies' Pollution Exclusion. Because the City must  
14 show that both the Pollution Exclusion and the Owned Property  
15 Exclusion do not apply in order to prevail, the court need not  
16 reach the question of whether established facts sufficiently  
17 negate Arrowood's allegations regarding the Owned Property  
18 Exclusion.

19 IT IS THEREFORE ORDERED that Defendant City of West  
20 Sacramento's Motion to Dismiss (Docket No. 11) be, and the same  
21 hereby is, DENIED.

22 Dated: May 4, 2021



23 WILLIAM B. SHUBB  
24 UNITED STATES DISTRICT JUDGE  
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